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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 478

WILLIAM G. STRATTON, CHARLES F. CARPENTIER, ELBERT S. SMITH, JOSEPH D. LOHMAN AND C. ARTHUR NEBEL, SUBSTITUTED FOR GRENVILLE BEARDSLEY, DECEASED,

Petitioners,

vs.

LAR (AMERICA FIRST) DALY,

Respondent.

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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CHAMPLIN-SWEALY COMPANY, CHICAGO — 365

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THE OPINIONS BELOW, THE DATE OF THE JUDGMENT APPEALED FROM AND THE DATE THAT REHEARING WAS DENIED.

The opinion of the Court of Appeals for the Seventh Circuit is reported in 304 F. 2d at pages 666 to 668. It is reprinted in full as Appendix I to this Petition.

The district court's memorandum is not reported. It is reprinted in full as Appendix II to this Petition.

The judgment of the Court of Appeals for the Seventh Circuit was entered on June 12, 1962. It is reprinted in full as Appendix III to the Petition.

Petition for rehearing was denied on July 5, 1962.

THE STATUTE CONFERRING THIS COURT'S JURISDICTION OVER THIS PETITION.

This Court's jurisdiction over this petition for *certiorari* is conferred by Title 28, Section 2101 of the United States Judicial Code, which authorizes this Court to grant *certiorari* to review judgments of United States Courts of Appeal on petitions filed within ninety days from the date of any such judgment.

THE QUESTIONS PRESENTED.

The questions presented are:

I. THE DISTRICT COURT DISMISSED THIS ACTION UNDER THE FEDERAL CIVIL RIGHTS ACT AGAINST ILLINOIS' FORMER GOVERNOR AND OTHER STATE OFFICERS COMPRISING ILLINOIS' STATE PRIMARY BOARD. IT LATER REINSTATED THIS SUIT UPON THE PLAINTIFF'S PETITION FOR SUCH REINSTATEMENT FILED MORE THAN TEN DAYS AFTER THE ENTRY OF THE ORDER OF DISMISSAL. THE DISTRICT COURT DENIED PETITIONERS' TIMELY MOTION TO VACATE THE ORDER OF REINSTATEMENT.

WERE THE ORDER OF REINSTATEMENT AND THE DENIAL OF PETITIONERS' TIMELY MOTION TO VACATE THAT ORDER "FINAL AND APPEALABLE"?

II. DID THE DISTRICT COURT ABUSE ITS DISCRETION IN REINSTATING THIS CASE AND IN REFUSING TO VACATE ITS ORDER OF REINSTATEMENT?

RULES OF FEDERAL CIVIL PROCEDURE INVOLVED.

"Rule 55. Default.

"(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead

or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

"(b) Judgment. Judgment by default may be entered as follows:

(1) By the Clerk. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person.

(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take or account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

"(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60 (b).

"Rule 59. New Trials; Amendment of Judgments.

"(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

"(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

"(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

"(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

"(e) Motion to alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

"Rule 60. Relief from Judgment or Order.

"(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be cor-

rected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

"(b) Mistakes; Inadvertences; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1), mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for new trial under Rule 59 (b); (3) (fraud whether heretofore denominated intrinsic or extrinsic) misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., sec. 1655, or to set aside a judgment for fraud upon the court. Writs of *coram nobis, coram vobis, audita querela,* and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."